Supreme Court, U.S.
FILED
OCT 6 1994
OFFICE OF THE CLERK

No. 93-2013

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

CITY OF SAN DIEGO,
Petitioner,

vs.

PHILIP K. PAULSON, HOWARD T. KREISNER
& SOCIETY OF SEPARATIONISTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals

PETITIONER'S REPLY MEMORANDUM

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1. Factual Background

A. Veterans' Memorial

Respondents have not provided a complete factual summary. Petitioner agrees that the Memorial Cross was originally dedicated on Easter Sunday 1954 and that services have been held there on successive Easter Sundays. However, there were also military and veterans' groups present at the dedication and who continue to participate in ceremonies at Mt. Soledad honoring veterans of World Wars I, II, and Korea. Respondents include what allegedly is a page of a 1992 America Automobile Association map to illustrate that the Memorial Cross is characterized as the "Soledad Mountain Easter Cross." However, a 1994 Thomas Brothers Map of San Diego County, p. 1207, § J7 identifies the Cross as "The Mt. Soledad Memorial Cross." (Appendix A.) It is

irrelevant that one map identifies the Cross by one name, a different map by another. Neither is persuasive evidence of the nature of this Cross. The Memorial Cross was erected and dedicated as a war memorial, and continues to fulfill that function, regardless of how it is labeled.

B. Identifying Plaque

An identifying plaque was not put up at the time the Cross was erected because the Mt. Soledad Memorial Association, which built, owns, and maintains the Cross, did not have sufficient funds to do so. Through renewed citizen interest in membership in the Memorial Association as a result of this lawsuit, enough donations have been made to enable the Memorial Association to have a plaque made and attached to the fence surrounding the Memorial Cross. (Petition for Certiorari, hereinafter "P" -J)

C. Dedication as a War Memorial

This Memorial Cross is not an "Easter" Cross as Respondents would have the Court believe. Although the Cross was dedicated on Easter, the prominent part the veterans' groups played at the dedication, which is not a normal part of Easter services, makes it clear that the Cross is not an exclusively religious structure. It is important to remember the mentality and the tone of the U.S. in the 1950's when this Memorial Cross was dedicated.[1] At that time a cross

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[1] *See* 36 USC § 172, Pledge of Allegiance to the Flag. "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation *under God,* indivisible, with liberty and justice for all." (emphasis added.) The words "under God" were added June 14, 1954; *See also* 36 USC § 186, National Motto. "The national motto of the United States is hereby declared to be "In God we trust." *See Aronow v. United States,* 432 F.2d 242, 243 (Ninth Cir. 1970) "It is quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust' has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial

was a commonly accepted symbol of respect and commemoration of the sacrifices made by military veterans. In fact, as noted in the Petition for Writ of Certiorari, the American Battle Monuments Commission continues to mark veterans' final resting places with a cross. (Petition for Cert., H-2)

2. The Memorial Cross' Historical Designation

Respondents claim that Petitioner told the district court that the Cross was a war memorial, but has changed its argument and now characterizes the Cross as an "historical structure." (Brief in Opposition, hereinafter, "B" -3) In fact, Petitioner's argument continues to be that the Memorial Cross is an *historical* war memorial. At the time the district court heard the case, the Cross had not been designated an historical structure. The citizen campaign to have the Cross designated by the San Diego Historical Society began prior to the filing of Respondents' lawsuit. Obviously, Petitioner could not represent the Cross as a designated historical structure to the district court prior to designation. Respondents are obviously aware of the private citizen involvement with the City's Historical Site Board. (B-4) Repsondents' representation to this Court that the "City's attorneys provided assistance to the private citizens who prepared the request to the City's Historical Site Board" is unfounded and untrue.

Respondents also make the erroneous statement that the ownership of the Cross is irrelevant to the legality of its placement. A private citizen group built, maintains, and still owns the Cross. Private ownership is relevant because that fact shows that the City has not attempted to either establish or prefer one religion over another or any religion over none.

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character and bears no true resemblance to a governmental sponsorship of a religious exercise."

3. Summary of Argument

A. Questions Presented in Petition for Writ of Certiorari

Respondents seem to have missed the distinction between the Questions Presented in the Petition for Writ of Certiorari. The first question goes to the merits of the case and the second question is a procedural question relating to abstention. The primary authority on Supreme Court practice delineates some of the issues that are important when the Court is determining whether to grant certiorari. "On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility . . . As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." Robert L. Stern, et al., *Supreme Court Practice* 191-92 (7th ed. 1993) (quoting *Florida v. Rodriquez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting)).

Respondents argue that Petitioner has not satisfied the standards articulated in Supreme Court Rule 10.1(a)[2] It cannot be emphasized enough that federal courts should not decide important state questions — rather these issues should be decided by state courts. In an unusual move, the federal district court in this case, without prior notice to the

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[2]Supreme Court Rule 10.1(a) states in relevant part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

parties, based its decision solely on California law, when the parties had briefed and argued federal law almost exclusively. The Court of Appeals also based its decision on California law. This is precisely the type of situation for which Rule 10.1(a) was written in order that the Supreme Court might intercede and provide necessary guidance to lower federal courts. If the district court felt that California law was more relevant, it should have abstained and directed Plaintiffs to bring their case in state court. Since that did not happen, the Court of Appeals should have ordered abstention when the case came before it on appeal.

Respondents are in error when they state that California law is settled on the No Preference clause of the California Constitution.[3] Respondents state that the legality of a Memorial Cross on public property has been decided by the California courts. (B-6) This is undoubtedly a reference to *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) in which, at specific times of the year, certain windows on City Hall in Los Angeles were lighted to form a cross. The only similarity between that case and this is that both refer to a cross-shaped display. This case concerns an historical Memorial Cross — a structure built, maintained, and owned by private citizens. It is not about a cross on, or near, the seat of government and with only religious connotations.

California law is not settled or clear enough on this issue to provide a clear indication as to how a California court would decide this case.[4] The relevant California cases refer to religious structures located either on or in government

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[3]Article 1, section 4 of the California Constitution provides in relevant part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed . . ."

[4]*See Sands v. Morongo Unified School District*, 53 Cal.3d 863, 902 (1991), *cert. denied*, 112 S.Ct. 3026 (1992), and *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) for discussion of the ambiguity of opinion of California cases on these issues. (P-18)

buildings. An in-depth discussion of California No Preference cases is found at P. 14-16.[5] Respondents' complaint that Petitioner did not discuss the California cases sufficiently is immaterial. The primary California cases (*Sands, Fox,* and *Okrand*) were not discussed in detail because they shed little or no light on how the California courts would handle the hybrid structure of this particular Historical/Memorial Cross.

B. *Allegheny County* Distinguished

Because this Court in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), discussed proximity to core government buildings, Respondents counter petitioner's declaration that the Soledad Memorial Cross is 13.5 miles from City Hall by providing a mileage figure that is four miles less than Petitioner's. (B-9) Whether the distance was 13.5 miles or 9.5 miles is not important. The important fact is that the Cross on Mt. Soledad cannot be seen from City Hall, nor can City Hall be seen from the Cross. There is no connection between the seat of government and the Cross such that an uninformed observer would think that the Cross is a symbol of any preference by the government for a particular religion or religion in general. In *Allegheny*, 492 U.S. at 599, Justice Blackmun stated that a creche could not be allowed to remain because in the county courthouse it "sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government." The Memorial Cross is miles from the seat of City government, and therefore should not suffer the same fate as the creche in *Allegheny*.

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[5]*See Sands v. Morongo Unified School District*, 53 Cal.3d 863 (1991), *cert. denied*, 112 S.Ct. 3026 (1993); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978); *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566 (1989); *Hewitt v. Joiner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied* 112 S.Ct. 969 (1992).

C. Abstention Argument

Respondents apparently feel that historic structures not to their liking are not deserving of preservation. They ridicule the seriousness with which Petitioner and Amicus, The Attorney General of California, treat the subject of California's Historical artifacts and structures. ("Disaster impends.") (B-10-11) It is imperative that states be allowed to interpret their own laws and constitutions in order to preserve their own unique history, structures, and artifacts. For example, the names of several cities and some of the early buildings (whether former bordellos, churches, or synagogues) in California may not be important to the citizens of other states. Likewise, the historical artifacts and structures of other states may not be important to the citizens of California. That is precisely the reason why federal courts should abstain from interpreting state laws and state constitutions where the law is unsettled. The federal courts do not have the knowledge, the expertise, or the interest in local history that state courts have and that is necessary to provide an appropriate opinion.

Respondents cite the opinion of *Hewitt v. Joiner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied* 112 S.Ct. 969 (1992) for its analysis of the *Fox* and *Okrand* opinions. They attempt to somehow apply the appellate court's analysis in *Hewitt* to the facts of this case. That analysis is, of course, irrelevant to this case because *Hewitt* involved religious statues in a park that was endorsed by government. The subject of this case is a privately owned, designated historical war memorial. *Hewitt v. Joiner* should not be interpreted as precedential to this case.

California courts, not the federal courts, should interpret the language of the California Constitution, particularly where state law is not clear and there is no guidance from any state case on how the instant case would be decided. The Mt. Soledad Memorial Cross creates a case of first

impression and is not analogous to *Fox, Okrand, Hewitt v. Joiner*, or *Sands*, but rather requires independent analysis by state courts.

CONCLUSION

1. The Memorial Cross does not violate the California or the Federal Constitutions.

Petitioner respectfully requests this Court to grant certiorari and to find that the Mt. Soledad Memorial Cross violates neither the California No Preference Clause nor the Federal Establishment Clause. Preservation of valuable historical artifacts and structures is too important to be the subject of arguments over which court has jurisdiction. This case provides the Court with the opportunity to give notice that federal and state historical objects deserve preservation.

Absent a mandate from this Court, historical objects and structures may be at risk of loss or destruction. They must not be subjected to the vagaries of legal arguments, politics, or semantics. Nor should they be allowed to become the victims of persons or groups who oppose the history or background of any particular historical object. Petitioner respectfully requests this Court not be distracted by complaints that certain historical structures are offensive to some people, but rather keep the importance of historical preservation as a first priority.

Therefore, Petitioner respectfully requests this Court to grant certiorari, reverse the court of appeals and find that the historical Mt. Soledad Memorial Cross violates neither the California nor federal constitutions.

2. In the Alternative, Abstention is Requested.

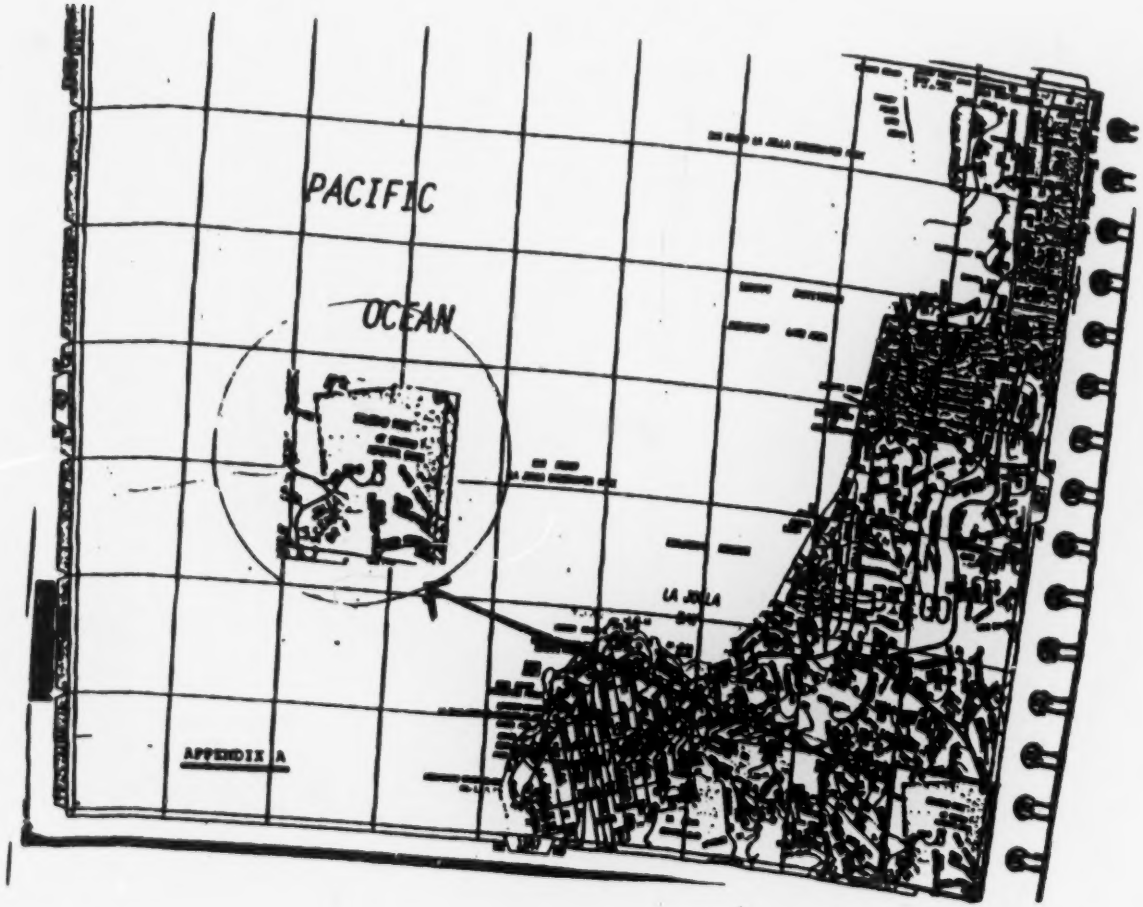
If this Court does not find that the Memorial Cross passes constitutional muster, Petitioner would raise the important

states' rights issue that states should have jurisdiction over state issues; in this case, historical artifacts and structures. Petitioner would ask this Court to follow the guidelines of Rule 10.1(a) and remind lower federal courts that states must be allowed to interpret their own constitutions. If a federal court decides a state issue where state law is unsettled, then that state is deprived of the right to interpret its own law and set precedent for its own courts. The federal courts have imposed upon a fundamental right of the states.

Petitioner respectfully requests this Court to grant certiorari and order this case to be heard in the state courts.

APPENDIX A

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APPENDIX A